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Supreme Court of the United States

October Term, 1958.

No. [redacted] 145

WILLIAM GIGLIO and FRANK LIVORSI,
Petitioners,

against

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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THE REPORTER COMPANY, INC., NEW YORK 7, N. Y.—REctor 2-6978—1959

Table of Contents.

	Page
The Opinion Below	1
Statement of Grounds of Jurisdiction	1
The Questions Presented	2
Statutory Provision Relied Upon	2
Statement of the Case	3
A. History of the Prosecution	5
B. Leone's Affidavit	10
C. Defendants' Motion to Set Aside the Judgments of Conviction	12
D. Leone's Testimony	13
E. The Termination of the "Hearing"	17
Reasons for Granting the Writ	18
I. The post-conviction revelations of a former prosecutor entitled the defendants to a plenary hearing despite the fact that he had appeared as a witness at the trial for other purposes	19
II. The District Court, having ordered a post-conviction hearing, erred in arbitrarily terminating it before the defendants had completed the presentation of their proof of the use of tainted evidence at the trial	31
Conclusion	39
Appendix A—Opinion Below	41
Appendix B—Judgment of Court of Appeals	47

TABLE OF CASES:

	Page
Chessman v. Teets, 350 U. S. 3 (1955); 221 F. 2d 276 (9th Cir. 1955)	18, 22
Farnsworth v. Murphy, 358 U. S. 48 (1958)	18, 29, 39
Giglio v. United States, 352 U. S. 875 (1956)	9, 10
Holiday v. Johnston, 313 U. S. 342 (1941)	27, 32
Jordan v. United States, 352 U. S. 904 (1956)	18, 28, 33, 39
Lawn v. United States, 355 U. S. 339 (1958)	4, 9, 19
Morgan v. United States, 298 U. S. 468 (1936)	35
Nardone v. United States, 308 U. S. 338 (1939)	28
Pennsylvania *ex rel.* Herman v. Claudy, 350 U. S. 116 (1956)	31, 33
Price v. Johnston, 334 U. S. 266 (1948)	18, 22, 24
Ex parte Rosier, 133 F. 2d 316 (D. C. Cir. 1942)	35
Turner v. United States, 258 F. 2d 165 (D. C. Cir. 1958)	24
United States v. Capsopa, 260 F. 2d 566 (2d Cir. 1958)	29, 39
United States v. Giglio, 232 F. 2d 589 (2d Cir. 1956)	9
United States v. Hayman, 342 U. S. 205 (1952)	21, 32, 33
United States v. Lawn, 115 F. Supp. 674 (S. D. N. Y. 1953)	7, 8, 34
United States v. Murphy, 254 F. 2d 438 (2d Cir. 1958)	29

Page

United States v. Paglia, 190 F. 2d 445 (2d Cir. 1951) 36

United States v. Roth, 208 F. 2d 467 (2d Cir. 1953) 8, 34

Walker v. Johnston, 312 U. S. 275 (1941) 27, 33

Zavada v. United States, 355 U. S. 392 (1958) 18, 29

STATUTE CITED:

Title 28, United States Code, §2255 ..... 2, 18, 21, 24, 35

Supreme Court of the United States

OCTOBER TERM, 1958.

No.

WILLIAM GIGLIO and FRANK LIVORSI,
Petitioners,
against
UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully ask this Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the judgment of that Court, affirming a judgment of the District Court which denied petitioners a full hearing on their application pursuant to Title 28, U. S. C., §2255, and denied petitioners' application to set aside the judgments of conviction herein.

The Opinion Below

The opinion of the Court below, appended hereto, is reported at 263 F. 2d. 410.

Statement of Grounds of Jurisdiction

The judgment of the Court of Appeals was entered on February 19, 1959. Timely application for rehearing was made on March 6, 1959, and was denied on April 1, 1959.

The jurisdiction of this Court is invoked pursuant to Title 28, U. S. C., §§1254 (1) and 2101 (e).

The Questions Presented

1. Where a former assistant United States attorney revealed, for the first time after defendants' conviction, that the government's initial knowledge of vital aspects of the prosecution came from tainted evidence, was it error to refuse the defendants a plenary hearing, as required by Title 28, U. S. C., §2255, on the ground that they had called the witness to testify at the trial with respect to other matters?

2. Where the District Court ordered a post-conviction hearing on the basis of an affidavit of a former assistant United States attorney, did the Court err in arbitrarily terminating the hearing, without affording the defendants an opportunity, which they sought, to prove the use of tainted evidence at the trial?

Statutory Provision Relied Upon

Title 28, U. S. C., §2255, provides:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> "A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

Statement of the Case

Petitioners seek a review of a judgment of the United States Court of Appeals for the Second Circuit which affirmed an order of the United States District Court for

the Southern District of New York, denying petitioners' application to set aside the judgments of conviction. The District Court had jurisdiction of the cause under Title 28, U. S. C., §2255.

Petitioners moved in the District Court, by order to show cause, to vacate the judgments of conviction entered in that Court on March 11, 1955, after a jury trial (R. 2765).* Petitioners were convicted of income tax fraud and conspiracy in connection with the Internal Revenue Code of 1939 and were sentenced to fifteen years imprisonment (R. 2741). The judgments of conviction were affirmed by the Second Circuit Court of Appeals, 232 F. 2d 589, and by this Court, *sub. nom., Lawn v. United States,* 355 U. S. 339.

Almost three years after the trial and conviction of the defendants, Gerome J. Leone, a former assistant United States attorney, who at one time had been in sole charge of the prosecution, revealed that the government's first knowledge of important aspects of the prosecution came from tainted evidence. The defendants promptly moved for an order voiding the judgments and for a new trial (R. 2765-6). The defendants sought a full-scale post-conviction hearing to determine whether this admittedly tainted evidence, or leads and clues derived therefrom, had been used against them at the trial.

No question was raised in the Courts below concerning these significant matters:

1. The person who made the charges, which formed the basis of defendants' application, was a former assist-

* References to pages of the petitioners' Appendix below are indicated by "R." Petitioners' Appendix on the present application begins with R. 2761. The pages preceding R. 2761 are contained in petitioners' Appendix submitted to this Court in connection with the review of the judgments of conviction. *Lawn v. United States,* 355 U. S. 339. References to pages of the government's Appendix on the present application are indicated by "G."

ant United States attorney who, at the critical period, had been in complete charge of the prosecution of the case.

2. The defendants did not learn, until March 5, 1958, twelve days before they applied to the District Court for relief under §2255, that the government's first knowledge of these vital matters came from the papers and records which defendants had been illegally compelled to produce in violation of their constitutional privilege against self-incrimination.

3. The defendants have never had an opportunity to examine the special agents of the Treasury Department who, it was admitted below, "knew where the United States Government got its information," i. e., the information which was used against the defendants at the trial (R. 2838).

These three factors, all undisputed, were determinative of the defendants' right to a plenary hearing which was denied by the District Court."

A. History of the Prosecution

Despite a lengthy tax investigation by agents of the Treasury Department commencing in 1945 (G. 1a), no indictment was found against the defendants until after they themselves were subpoenaed before a grand jury and forced to produce papers and records in violation of their constitutional privilege against self-incrimination (R. 38-39). Mr. Leone, the assistant United States attorney in charge of the prosecution during the crucial period of the investigation, revealed under oath, after the defendants were tried and convicted, that, until their partnership books and records were obtained by subpoena, the government did not have the basis for an indictment (R. 2891). This statement was neither contradicted nor challenged below.

The tax returns involved in this prosecution covered the income of two partnerships, Eatsum Food Products Co., Ltd., and Tavern Fruit Juice Co., that of several corporations, American Brands Corporation and related corporations bearing the name "American," as well as that of the individual defendants Giglio and Livorsi. The period involved began approximately April 16, 1945, and ended at the close of the year 1946.

The principals in the investigation were the present petitioners, Giglio and Livorsi, an accountant by the name of Louis Roth (who pleaded guilty to nine counts of the indictment several months before the trial, appeared at the trial as a witness on behalf of the government and as a result received a suspended sentence with probation for five years) and Howard M. Lawn who was found guilty of each of the three counts of the indictment in which he was named as a defendant, and sentenced to imprisonment for one year and a day. Lawn joined the defendants in the motion below, but did not appeal from the adverse decision.

On September 14, 1950, three criminal informations were filed in the United States District Court for the Southern District of New York charging violations of §145(a) of the 1939 Internal Revenue Code. One information charged defendant Giglio with failure to pay any part of his income tax for 1946, except the sum of $4,000 as estimated tax. Another charged defendant Livorsi with the same offense. A third charged defendants Giglio, Livorsi, Lawn and Roth with unlawfully causing American Brands Corporation to fail to pay any part of its income tax for 1946, except the sum of $100 (R. 28-29, 2855).

The defendants appeared, pleaded not guilty and were released on bail (R. 29). The informations were marked off the calendar, while the investigation continued (R. 29). The defendants, against whom the original charges

were still pending, were then served with separate subpoenas *duces tecum* directing them to appear before a grand jury sitting in the Southern District of New York on July 15, 1952, to "give evidence in regard to an alleged violation of Title 18, §371," the conspiracy statute. The grand jury proceeding was entitled simply "*Re:* John Doe" (R. 29).

The subpoenas directed the appearance of all of the defendants (Giglio, Livorsi, Lawn and Roth) before the grand jury to testify and to produce the books and records of twelve business organizations, eight of which were corporations and four of which were partnerships (R. 29). The partnerships included Eatsum and Tavern; the corporations included the "American" group.

The grand jury proceedings were conducted by Leone (R. 2858). The defendant Livorsi, upon his appearance before the grand jury on July 15, 1952, was not warned of his privilege against self-incrimination and did not waive the privilege. The defendant Giglio who appeared before the grand jury, in response to the subpoena on seven occasions beginning on July 15, 1952, repeatedly asserted his privilege against self-incrimination with respect to certain phases of the prosecutor's inquiry; but nevertheless was pressed for answers and compelled to divulge privileged information and forced to produce partnership records of Tavern and Eatsum, among others. *United States v. Lawn*, 115 F. Supp. 674, 676.

On October 20, 1952, the grand jury found six indictments against the defendants Giglio and Livorsi, together with Roth, Lawn and American Brands Corporation. These six indictments contained ten counts in all. The defendants thereupon moved to dismiss the indictments found in 1952, and the informations filed in 1950, on the ground that constitutional rights, guaranteed to a defend-

ant in a criminal case by the Fifth Amendment to the Constitution of the United States, had been violated before the grand jury. On March 27, 1953, the District Court (Goddard, U. S. D. J.) dismissed the indictments and directed the government to return, to the respective defendants, partnership and personal records produced by them in response to the grand jury subpoenas served upon them in July of 1952. *United States v. Lawn, supra*, at 678.

Judge Goddard held that the 1952 indictments, which substituted felony charges for the misdemeanors alleged in the 1950 informations, were predicated upon tainted evidence, obtained in violation of the constitutional rights of the defendants. He found that "the defendants were questioned concerning matters which could incriminate them" and that "the evidence obtained on the examinations of the defendants at least furnished a link in the chain of evidence needed to convict them for the crimes charged. In *Giglio's* case, it was procured after he had pleaded his privilege. The constitutional rights of the defendants were thus clearly violated." *Id.*, at 678.

The government's appeal to the Court of Appeals was dismissed, on defendants' motion, on the ground that it was not timely. *United States v. Roth*, 208 F. 2d 467 (2d Cir. 1953). On motion for reargument, the Court adhered to its original decision. *Id.*, at 469.

Pending the government's appeal to the Court of Appeals, and in anticipation of the expiration of the statute of limitations in September of 1953, another grand jury, on July 23, 1953, found a sealed indictment against the defendants, consisting of ten counts, which were identical, in all material respects, with the ten counts of the six indictments which Judge Goddard had dismissed (R. 32-35).

Since the present proceedings are predicated upon two items of proof relating to the Tavern partnership, namely, the omission of a closing inventory and the deduction of a research expense, which the government conceded were "important bases of the indictment and prosecution" (G. 77a), we note here merely that the 1953 indictment (R. 10-21), on which the defendants were tried and convicted, included counts charging that Giglio filed a false partnership return for Tavern for the fiscal year ending March 31, 1946 (R. 10-11) and a false personal income tax return for 1946 (R. 13) in which he was required to report his income from Tavern, and that Livorsi filed a false personal income tax return for 1946 (R. 14) in which he similarly was required to report his income from Tavern. The Tavern partnership return also figured in the conspiracy charge alleged against both defendants (R. 18, 19).

The bill of particulars charged that the Tavern return was wrong in only two respects, namely, the omission of a closing inventory of $72,321.17, and the claim of a research expense deduction of $32,780.93. Two other adjustments in the bill of particulars were made in favor of Tavern and reduced its tax liability (R. 22-3).

The defendants were found guilty by the jury, after trial, and Judge Walsh sentenced both to a term of imprisonment totaling fifteen years (R. 2741). The judgments of conviction were affirmed by the Court of Appeals (*United States v. Giglio*, 232 F. 2d 589 [2d Cir. 1956]).

On October 15, 1956, this Court granted certiorari, *Giglio v. United States*, 352 U. S. 865, and, on January 13, 1958, affirmed the judgments of conviction, *sub. nom. Lawn v. United States*, 355 U. S. 339. In a companion case, involving the appeal of the defendant Lawn, three Justices dissented on the ground that the prosecutor had

used tainted evidence at the trial. *Id.*, at page 363. The majority of the Court held, however, that the use of such tainted evidence had been waived by trial counsel. *Id.*, at page 353.

On March 3, 1958, this Court denied defendants' application for rehearing. *Giglio v. United States*, 355 U. S. 967.

B. Leone's Affidavit.

The defendants' application to vacate the judgments of conviction was predicated upon Mr. Leone's affidavit (R. 2777), sworn to March 14, 1958, which disclosed the following:

Leone was an assistant United States attorney for the Southern District of New York from August, 1950, until approximately August 1, 1953. During that period he was in charge of the prosecution of this case. In July of 1952, he caused each of the defendants to be served with a grand jury subpoena *duces tecum*, pursuant to which they produced their business records before the grand jury. These papers were placed in Leone's custody and were the subject of an investigation conducted by revenue agents and special agents of the United States Internal Revenue Service under his direction (R. 2777).

Leone was questioned by counsel for the defendants, between March 7, 1958 and March 14, 1958, regarding leads and clues which might have been deduced by the government from the books and records produced by the defendants or some of them (R. 2777-8). He recalled two such items which, to his knowledge, were subjects of the indictment and of several counts therein (R. 2778). The government conceded, in the District Court, that these items were "important bases of the indictment and prosecution" (G. 77a).

The first was a closing inventory of the partnership known as Tavern Fruit Juice Co., of which the defendants Giglio and Livorsi were two of the partners. With respect to this item, Leone stated (R. 2778):

> "It is my recollection that the government had no knowledge of the closing inventory, which inventory, to the best of my recollection, was approximately $60,000 or $70,000. It was only after the defendants produced the books and records that we were able to determine that such an inventory existed and that said inventory was excluded from any tax returns by the defendants."

Leone also referred to "an item of some thirty thousands of dollars for research expended by Tavern Fruit Juice Co.," and added (R. 2778):

> "Concerning this item, involving a person known as Goldenberg or Gordon, to the best of my recollection, the government had no knowledge prior to the production of the aforementioned books and records. It is my best recollection that this item was deduced from cancelled checks which had been produced by the defendants herein or some of them."

Regarding a third item, namely the cash box of a partnership known as Eatsum Food Products Co., Ltd., Leone stated (R. 2778-9) that the defendants had produced documents "which first corroborated the existence of said cash box but moreover gave to the government evidence of the method of the operation for which this cash box was used." The defendants made no point of this item below and raise no issue here with respect thereto.

Concerning other matters called to his attention, Leone stated (R. 2779) that his best recollection was that the government "did have knowledge of those other items mentioned by counsel and that the records produced were at best only corroborative."

C. Defendants' Motion to Set Aside the Judgments of Conviction

The defendants moved promptly on the basis of Leone's affidavit, to set aside the judgments of conviction. Leone's assertions called for a fair, even-handed and thorough inquiry. Instead, they evoked, during the oral argument of the application for a hearing, a series of minatory gestures, utterly unjustified by anything in the record. The Court stated that Leone's "affidavit, which precipitates this motion, is of itself certainly, to put it mildly, of the tainted variety" (R. 2829), observed that the witness might be acting in "the hope and expectation of some kind of a reward. * * * There is a lot of money here, I would assume * * *" (R. 2833-4), and suggested that Leone "should be disbarred from this court unless he is the innocent victim of circumstances" (R. 2834).* The prosecutor made ominous reference to the possible interest of the Department of Justice (R. 2831).

The order signed by Judge Noonan provided (R. 2781) that "defendants' application is granted to the extent that a hearing is hereby set down for May 6, 1958, at which defendants' first witness shall be Gerome J. Leone." Leone proved to be the last, as well as the first, witness. Despite defendants' objections and their offer to proceed with the proof (*infra*, pp. 17-18), there was no "thorough hearing of the charges and the government's answer thereto" as the District Judge orally had directed (R. 2829).

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* The District Court stated (R. 2969) that Leone's affidavit "struck a curious note, because it was sworn to two days after this case had been affirmed by the United States Supreme Court. Obviously somebody had been preparing an affidavit in advance." The Court did not explain what was "curious" about "preparing an affidavit in advance" of the decision of this Court. Actually, this Court affirmed on January 13, 1958, and denied an application for rehearing on March 3, 1958. Leone's affidavit was sworn to on March 14, 1958 (R. 2779), two months after affirmance by this Court.

D. Leone's Testimony

As soon as Leone took the stand, the prosecutor suggested that he recant in view of the affidavits in opposition (R. 2849). The prosecutor repeatedly interrupted Leone's direct examination, inquiring each time whether Leone had read the government's answering affidavits and whether he would not change the affidavit on which the motion was predicated (R. 2869, 2872, 2907).

At one point the prosecutor observed, with some vehemence, that the witness had been criticized "by the press, and perhaps also by the Court, for having made the statements he did and the answering affidavits attacked this witness. * * * it is hardly credible that this man has not read the answering affidavits" (R. 2907). He then charged the witness with "gross impropriety" (R. 2919).

The Court asked Leone whether he would prefer to read the affidavits in opposition and the witness stated that in view of the Court's ruling, he would do so (R. 2918). After the witness said that he had read several of the opposing affidavits and had scanned through the others briefly (R. 2929), the prosecutor once again suggested that Leone might desire to amend his affidavit or revise it (R. 2929).

Finally, defendants' counsel asked Leone whether there was anything in his affidavit which he wished to change or which he found was not true and the witness stated that everything in his affidavit was true (R. 2937). Certain things came to his mind in reading two of the affidavits submitted in opposition which gave him a clearer picture on some items and in some others they didn't change his mind at all (R. 2937). He stated unequivocally that, in any event, the statements in his affidavit were true as far as he remembered (R. 2937).

Leone testified that Twohig, a special agent of the Intelligence Division of the Internal Revenue Service, had been doing all the "leg work" in the case for many years and had come up with a great deal of information, particularly concerning the activities of Eatsum (R. 2890). Twohig had been assigned, during the latter part of 1945, to investigate the Eatsum partnership, whose partners were the defendants Giglio and Livorsi, and one David Lubben. Roth and Lawn were associated, but not as partners, in this venture (G. 1a).

Then another company came into existence by the name of Tavern. The government knew that a man named Gangi and someone else had owned this company and "all of a sudden" the defendants became involved in the Tavern picture (R. 2890).

Then Tavern went out of business. Another company, American Brands Corporation, went into business. There was nothing to show that American Brands Corporation had purchased merchandise with which to start business. Therefore, the "logical assumption" was that American Brands Corporation, without paying consideration for it, took the inventory from Tavern and went out and sold it (R. 2875). The government never "knew this" or at least Leone did not (R. 2875).

The government knew the pattern "but there were a great many holes in the pattern" (R. 2890). Up until July, 1952, the defendants had been charged merely with misdemeanors in informations filed against them. The government was continuing to investigate them. In Leone's opinion, before July 3, 1952, there was not the basis for an indictment against the defendants (R. 2891). In response to the subpoenas *duces tecum*, served in July, 1952 (R. 2768), the defendants produced a station wagon load of records (R. 2873). The defendants produced their invoices, bills and cancelled checks (R. 2930-1).

Prior to the time the defendants produced these records, the government and its agents, to Leone's knowledge, had no evidence of the actual physical existence of a closing inventory of Tavern Fruit Juice Co. (R. 2873). They assumed that there was a closing inventory (R. 2873). The government did not have the name of the warehouse or the names of its employees (R. 2906). If the government had the name of the warehouse, or the name of the warehouse employee who was subpoenaed after the defendants turned over their records, Leone did not know it (R. 2931).

Theodore Present, the revenue agent assigned to this case, was working in another office in Room 438 of the Federal Building, during the summer of 1952 (R. 2876). After the mass of documents was received from the defendants, Present and the other agents segregated the different documents and worked on them. They listed the checks on worksheets (R. 2931). Present came into his office after the defendants had produced these 80-odd cartons of records and said: "I think we found the inventory." He had a slip of paper in his hand which Leone believes was an invoice from the warehouse. Leone then attempted to locate the warehouse and finally did. They learned that the inventory had been placed there. He believes that what Present showed him was a bill to either Tavern or American Brands Corporation representing a storage charge for a certain number of barrels or cases. From this they now knew there had been some $60,000 of inventory. Prior to that they only knew it should have existed but they never knew what happened to it (R. 2874).

After the defendants had produced their records, and after Present had shown Leone this warehouse slip or invoice, they made use of that information in the prosecution of the case (R. 2880). It was an assumption on Leone's part from what was going on, and the way the

matter was being conducted at the time, that Present got the warehouse slip or invoice from among the papers produced by the defendants under the subpoena *duces tecum* (R. 2884).

With reference to the Goldenberg or Gordon expenses, the checks that were produced by one or two of the defendants indicated, substantiated or further corroborated their belief that this was an improper deduction on the tax return. In other words, the government knew that the deduction had been taken, but they did not know why or how (R. 2881). They had a suspicion about a great many things, but before they got an indictment they wanted evidence (R. 2882).

It was not a case where they could definitely say that these defendants had claimed a deduction which was improper (R. 2883). The first corroboration they had that the Gordon research expenses were false or fraudulent was after July 16, 1952, when the defendants produced their records, including the checks. Before that it was an assumption (R. 2884).

What he meant by "corroboration" was that something did not ring true (R. 2884-5). Gordon had been convicted for running a still. He was not a man who would be expected to engage in an engineering or a research project. Because Gordon was formerly a bootlegger and a deduction had been taken on the Tavern return, they suspected there might have been something wrong with this deduction. They had a suspicion there was (R. 2885). Leone failed to agree with a suggestion from the Court that they "certainly must have had more than a suspicion" (R. 2886).

Then the defendants produced two sets of checks. One was for large sums of money and one was for weekly payments. It was the government's feeling that Gordon had taken these checks for large sums of money, had gone

into a bank and cashed them and had returned the money to the principals. He does not believe that the checks had ever been deposited in the bank (R. 2885). When the defendants' records were produced, he believes that Gordon was subpoenaed and brought to New York from Cleveland (R. 2885).

Twohig had questioned Gordon prior to the time that the checks had been produced by the defendants. All that Twohig was able to obtain from Gordon were self-serving declarations (R. 2888). After the checks were called to Leone's attention, they were used by him in the prosecution of the case (R. 2888).

E. The Termination of the "Hearing"

While Leone's testimony constituted an important phase of the inquiry, it was merely a first step. Leone had not tried the case. He was not connected with the prosecutor's office when the case was tried. He did not know what evidence the government used at the trial. Obviously, he did not know whether any part of the trial evidence had its origin in what Judge Goddard had adjudicated was tainted evidence, unconstitutionally and illegally obtained from the defendants.

Having indicated his intention to hold "a thorough hearing of the charges and the government's answer thereto" (R. 2829) with the object of "letting the whole thing come out and letting the chips fall where they may" (R. 2827) because "if you could show as a result of an examination of Leone that certain things that he seems to say in that affidavit were, in fact, the truth, that you then have made out a prima facie case" (R. 2954), the Court erred (a) in refusing to order the government to produce relevant documents for use in connection with Leone's examination (R. 2856, 2894-6, 2897-2900, 2915, 2918); (b) in terminating the hearing at the conclusion of Leone's

direct examination (R. 2960-2) without permitting the defendants to examine the witnesses who, according to the prosecutor, "knew where the United States government got its information" (R. 2838), namely, the Treasury agents who had investigated the case (R. 2838-9) since 1945 (G. 1a); (c) in refusing to permit the defendants generally to go forward with the proof to establish the use of tainted evidence at the trial (R. 2955), including the use of expert witnesses for that purpose (R. 2956); and (d) in refusing to afford the defendants an opportunity to recall Leone for further questioning (R. 2959, 2963-5).

Reasons for Granting the Writ

The judgment sought to be reviewed, affirming the District Court's denial, without a full-scale hearing, of a petition under Title 28, U. S. C., §2255, raises issues which this Court consistently has regarded as vital to the fair and impartial administration of justice in the federal courts. The decision below cannot be reconciled with the holdings of this Court in *Chessman v. Teets*, 350 U. S. 3 (1955) and *Price v. Johnston*, 334 U. S. 266 (1948). Summary reversals, in a series of recent decisions, *Farnsworth v. Murphy*, 358 U. S. 48 (1958), *Zavada v. United States*, 355 U. S. 392 (1958) and *Jordan v. United States*, 352 U. S. 904 (1956), in far less compelling circumstances, reveal a proper concern by this Court, that similar applications should not be governed by the narrow considerations applied below.

I

The post-conviction revelations of a former prosecutor entitled the defendants to a plenary hearing despite the fact that he had appeared as a witness at the trial for other purposes.

The Court of Appeals held (263 F. 2d 410, 412) that, at the trial, (1) the defendants were aware that there was evidence which was subject to attack, (2) they were aware that they were at liberty to attack it, and (3) they actually exercised this privilege, "even to examining the Assistant U. S. attorney, whose testimony as to when and how the government first learned of the facts essential to its case, defendants now claim was vital."

The Court below thus ruled that the defendants were not entitled to a hearing on the basis of Leone's post-conviction revelations because they had called him as a witness at the trial. The basic premise of this decision is demonstrably unsound.

A

Lawn v. United States, 355 U. S. 339, in which this Court reviewed the judgments of conviction, held (at p. 355) that these petitioners were entitled to "an opportunity to examine and cross-examine witnesses at the trial to determine whether evidence derived from leads and clues furnished by materials obtained from them in the 1952 grand jury proceedings was used by the prosecution at the trial * * *."

In answer to petitioners' contention that they were denied this right, in connection with their examination of three separate witnesses, this Court, after "a thorough

study of the record" (p. 355), found that with respect to two of the witnesses who had been called by the government, namely, Roth and Present, the defendants had sought "not to determine whether tainted evidence had been or was being used at the trial, but * * *, rather, to determine whether tainted evidence was 'used by the grand jury that found this indictment'" (p. 357), an inquiry which, the Court found, they were not entitled to pursue (p. 350).

With respect to Mr. Leone, the third witness, who was called by the defendants at the trial, this Court held that defendants were not denied the opportunity "to show derivative use of tainted evidence by the Government at the trial" (pp. 357-8) because "all petitioners sought to show by this witness was that when he caused petitioners to be subpoenaed to appear before the 1952 grand jury he knew that criminal informations charging tax evasions were then pending against them, and that these prosecutions were instituted in 'bad faith'" (p. 358, note 14).

This Court has held merely that defendants had the right to attack the evidence adduced at the trial but failed to exercise that right. This Court has not held that the defendants actually exercised this right with respect to any witness who appeared at the trial. This Court has not held that defendants had knowledge of any specific facts at the trial (such as they had after Leone's revelations), which would require them to raise the issue then and there, or forever be precluded.

Indeed, the defendants had no knowledge during the trial, and therefore could present no evidence to the trial Court, of the actual use of tainted evidence by the government at the trial which would have required a hearing. As this Court observed (pp. 355-6):

> "At no time did counsel for petitioners point specifically to any evidence offered at the trial which they claimed was derived from materials furnished by petitioners before the 1952 grand jury. Near the close of the Government's case, the court stated that, so far as he could detect, there had been no direct or derivative use of any tainted evidence by the Government at the trial, and he requested counsel for petitioners, on two occasions, to submit a memorandum of any evidence offered by the Government which he believed was obtained through leads or clues from materials produced by petitioners before the 1952 grand jury. No such memorandum was ever furnished."

The trial Court constantly admonished the defendants to furnish a "foundation * * * for a hearing" (R. 1958, 1945, 2078, 2081, 2085-6). Obviously, they failed to do so at the trial.

B

It is not disputed that the first intimation the defendants had of the information now provided by Mr. Leone came on March 5, 1958, more than three years after the trial (R. 2773, 2894). The fact that defendants, having called Leone for an entirely different purpose, might have established at the trial (had Leone volunteered the information) what they subsequently sought to establish, through him, after the trial, is no reason for denying relief under §2255. The section itself contains no such limitation. The Court below cited no case which so holds. Indeed, this Court has held the contrary in dealing with habeas corpus, the prototype of §2255, the latter section having been adopted to minimize the difficulties encountered in habeas corpus applications, "by affording the same rights in another and more convenient forum," *United States v. Hayman*, 342 U. S. 205, 219 (1952).

In *Chessman v. Teets*, 221 F. 2d 276 (9th Cir. 1955), the defendant, on an appeal from a judgment of the District Court, dismissing an application for a writ of habeas corpus, contended that his appeal to the Supreme Court of California had been heard upon a fraudulently prepared transcript of the trial proceedings which omitted portions of the trial Court's instructions and comments. The Court of Appeals pointed out (p. 278) that the defendant had had ample opportunity to urge the omissions from the trial record of which he now complained, since the California trial Court had entertained several of his applications for the correction of the record in connection with his appeal and, almost a year later, the Supreme Court of California considered his application to augment the record. The Court of Appeals noted that in "neither proceeding was this alleged missing instruction or comment called to the attention of the state courts. * * * Having been given every opportunity by the state before considering the automatic appeal in the case in chief to point out the alleged omissions, he cannot now urge the matters he previously failed to raise." This Court, nevertheless, reversed and remanded the case to the District Court for a hearing. 350 U. S. 3 (1955).

The correct disposition of this matter is suggested by *Price v. Johnston* 334 U. S. 266 (1948), where the prisoner, after three unsuccessful applications for a writ of habeas corpus, filed a fourth petition which he amended to allege that the government, at the trial, had knowingly presented the false testimony of a witness, in order to obtain the conviction. In affirming the District Court's denial of the petition, without a hearing, the Court of Appeals had stated (161 F. 2d 707):

> "On the face of his showing it is apparent he knew as much about the misconduct at the time it is said to have occurred as he knows now. Yet

> no reason or excuse is attempted to be advanced for his failure to set it up in one or the other of his prior petitions."

This Court held (334 U. S. at p. 286) that the fourth petition had been improperly dismissed by the District Court. It pointed out (p. 290-291) that there was one factor in the case that might be thought to justify the dismissal of the fourth petition, namely, that petitioner had prior knoweldge of the incident which formed the basis of his present application. At the trial, his own lawyer had elicited, from the witness, the information that he had talked to the prosecutor during the interval between the allegedly conflicting statements. Furthermore, petitioner had referred to that information during the course of the first habeas corpus proceeding. This Court (p. 290), however, refused to "assume that petitioner has acquired no new or additional information since the time of the trial or the first habeas corpus proceeding that might indicate fraudulent conduct on the part of the prosecuting attorneys."

This Court noted (p. 291), that whether the petitioner did or did not have any new information was a matter unrevealed by anything in the record and presented an issue which should be determined in the first instance by the District Court "[a]nd it is one on which petitioner is entitled to be heard * * *."

The Court continued (p. 291) that even if it were found that petitioner did have prior knowledge of the facts concerning his claim, it still did not follow that the fourth petition should be dismissed without a hearing:

> "If called upon, petitioner may be able to present adequate reasons for not making the allegation earlier, reasons which make it fair and just for the trial court to overlook the delay."

The primary purpose of a habeas corpus proceeding, said this Court, is to make certain that a man is not unjustly imprisoned, and if, for some justifiable reason, he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief. The Court further held (pp. 291-292) that the burden was not on the petitioner to affirmatively allege, in the first instance, that he had acquired new information or that he had adequate reasons for not raising sooner the issue of the knowing use of false testimony. "It was enough if he presented an allegation and supporting facts which, if borne out by proof, would entitle him to relief."

The dissenting Justices urged* merely that (pp. 297-298):

> "* * * the petitioner must also set forth facts which will excuse his failure to raise his question in earlier petitions * * *."

Here, it is a matter of record, not disputed by the government, that defendants acquired significant new information since the trial, that they, therefore, had more than adequate reasons for not making the present allegations earlier and, indeed, were previously unable to assert their rights.

Turner v. United States, 258 F. 2d 165 (D. C. Cir. 1958), specifically applies the holding in *Price v. Johnston, supra*, to a proceeding under §2255.

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*Another issue, on which the Court divided, which does not concern us here, was whether or not petitioner was entitled to appear personally before the Court of Appeals in order to argue his appeal.

C

The Court of Appeals asserted here (263 F. 2d 410, 412-413), that, upon the trial itself, "if evidence derived from tainted sources had been offered, counsel by *voir dire* examination could have learned from the witness, revenue agent or otherwise, from what source he had become aware of the facts about which he proposed to testify. The witness and he alone would be the person qualified to supply such information."

The record reveals that no such opportunity was available to the defendants. During the argument of petitioners' §2255 application in the District Court, the government stated that those having knowledge of the source of its information, i. e., the source of the evidence employed at the trial, were the Treasury agents, Tilzer, Twohig, Present and Mahon (R. 2838). Of these four, only Present appeared as a witness at the trial.

Present was not an investigator, he was the revenue agent who made the calculations. As he described it, his "primary responsibility was to handle the work of auditing and computing the tax liability of the defendants and of their companies" (G. 50a). He claimed, however, that he had also "assisted" in obtaining evidence to document the case (G. 50a).

Twohig and Mahon, on the other hand, were special agents of the Treasury Department (G. 1a, 124a). Twohig had handled the actual investigation in the field (G. 1a). His affidavit stated that he was familiar with the results of his own investigation and those of the agents who were also assigned to the investigation (G. 1a). He further stated, and this fact should be underscored, that he was present throughout the trial of the defendants and was familiar with all of the government's evidence adduced at the trial (G. 1a). Mahon, the other special

agent, swore that he had read Twohig's affidavit and had personal knowledge that the facts alleged therein were true (G. 124a). After the conviction of the defendants, only Twohig and Mahon, of all the agents who worked on the case, were singled out by the trial judge for "commendation" (R. 2740).

Twohig and Mahon, who were primarily entrusted with obtaining the evidence used to convict the defendants, were not called as witnesses, although they were present throughout the trial (R. 2740). It is at once apparent that evidence derived from tainted sources may have been used at the trial and that defendants' counsel, by *voir dire* examination of Present, and the other government witnesses, could not have learned where Twohig and Mahon, and the other special agents, obtained it. When defendants' counsel, at the trial, requested permission to call, as witnesses, Twohig, Mahon and the other special agents, who had submitted *affidavits* to the Trial Court, certifying to the fact that no tainted evidence would be, or had been, used at the trial, such permission was firmly refused (R. 2086-7). The defendants were clearly entitled to trace, through the special agents, the two items of Tavern evidence referred to by Leone, from the very inception of the government's knowledge through the proof adduced by the government at the trial, including all intermediate phases of the investigation, in order to ascertain whether leads and clues stemming from the violation of defendants' privilege against self-incrimination had resulted, in any way, in their conviction.

In effect, Present, the revenue agent who made the tax calculations, was used as a buffer between the defendants, on the one hand, and the special agents who gathered the evidence, on the other. When the Court of Appeals observed (263 F. 2d at p. 413), that the "defendants here have been afforded every opportunity at the appropriate time, namely, upon the trial, to inquire

as to the source of every witness' knowledge," it overlooked the plain fact that Twohig, Mahon and the other special agents who conducted the investigation in the field and who obtained the evidence which was used against the defendants, were not called as witnesses by the government at the trial (R. 2086-7), and that the trial Court had refused to permit the defendants to call them (R. 2086-7).

It is of the utmost significance that the government considered it necessary to submit to the trial Court affidavits by Twohig and Mahon, and other agents, in which they maintained that no tainted evidence had been used at the trial, and to submit to the District Court, on this motion, affidavits to the same effect, while these very agents were kept off the witness stand and the defendants prevented from questioning them. These *ex parte* affidavits obviously were intended to refute material issues of fact raised by petitioners. Under the holdings of this Court, the defendants were entitled to a hearing in order to examine the witnesses tendered by the government on these issues. *Walker v. Johnston*, 312 U. S. 275 (1941); *Holiday v. Johnston*, 313 U. S. 342 (1941).

D

The effectiveness of Leone's examination by the defendants, on the present application, was severely circumscribed by the refusal of the District Court to order the production of relevant documents by the government. The defendants were refused the reports of the Treasury agents (R. 2856, 2894-6, 2918) and Leone's notes of his conversations with the agents (R. 2897-2900). The defendants were entitled to these documents in order to refresh Leone's recollection and to ascertain, as a fact, whether the government had any evidence concerning

Tavern's closing inventory and the Gordon expenses prior to the acquisition of the tainted evidence (R. 2915). The refusal of the government to produce these documents must weigh heavily against any present contention that its evidence, at the trial, as to these items, came from untainted sources.

At the conclusion of Leone's testimony, counsel for the defendants offered to "go forward and show * * * by evidence that those leads and clues * * * were used, and necessarily had to be used, and are reflected in the product of the trial * * * in certain exhibits and certain testimony" (R. 2955). They offered to call expert testimony to establish that Presen, the revenue agent, could not have testified at the trial as he did without the use of tainted evidence (R. 2956). The defendants requested an opportunity to question Leone further (R. 2959) with respect to statements he had made previously under oath to counsel (R. 2963-5). In a brief submitted to the Court before its final ruling on the motion, it was requested that "the present hearing should be continued until the moving parties have concluded their offers of proofs, * * *" (Lawn Br., p. 1). The Court refused to receive any further evidence.

E

The claim presented by Leone's affidavit and his testimony had far greater "solidity," cf. *Nardone v. United States*, 308 U. S. 338, 342 (1939), than that presented by the defendant in *Jordan v. United States*, 352 U. S. 904 (1956), where this Court, in a memorandum decision, vacated the judgment of the Court of Appeals, which had affirmed the denial of a hearing by the District Court. There, the defendant, by his own affidavit, not the affidavit of a prosecutor, claimed double jeopardy on the ground that, at his first trial, the government deliber-

ately elicited an improper response from a witness with the purpose of procuring a mistrial. The Court of Appeals found, 233 F. 2d 362 (D. C. Cir. 1956), that "the bare possibility that Jordan can show a planned attempt by the prosecutor to procure a mistrial, so as to present the evidence against the accused more successfully on a subsequent trial, seems too remote to warrant an evidentiary hearing. Similarly, aside from petitioner's unsupported averment as to the prosecution's knowing use of perjured testimony, the record is barren of any indication of such use" (*id.* at p. 368). This Court, nevertheless, reversed summarily and ordered a hearing.

In *Farnsworth v. Murphy*, 358 U. S. 48 (1958), this Court similarly granted a petition for certiorari, summarily reversed the judgment of the Court of Appeals and remanded to the District Court for hearing. The opinion of the Court of Appeals, reported *sub nom. United States v. Murphy*, 254 F. 2d 438, 444 (2d Cir. 1958), indicates that the defendant moved there on "vague and conclusory allegations" and that his claim was "ancient, indefinite, implausible and patently void of any possible merit."

A similar case is *Zavada v. United States*, 355 U. S. 392 (1958). In each of these cases, a hearing was ordered by this Court on substantially less evidence than that afforded by the affidavit and testimony of Mr. Leone.

Shortly after the argument of the instant case, the Court below decided *United States v. Capsopa*, 260 F. 2d 566 (2d Cir. 1958), in which it reversed an order of the District Court denying defendant's application for a hearing. There, a motion was made, many years after defendant had pleaded guilty, to vacate two judgments of conviction entered in 1937 and 1941. The Court observed (at p. 568):

> "Had a hearing been held the court might well have found defendant's testimony to have been a 'naked assertion,' but as the record now stands there are two assertions (1) by the appellant that he was not represented by counsel in 1937 and in 1941 and (2) by the government that appellant was actually represented in 1937 and in 1941 and that it was the practice of the then trial judge to advise defendants of their rights and to insist upon representation by counsel. The weight to be attributed to the testimony of the various witnesses can best be determined upon a hearing."

The Court concluded (*id.*):

> "In final analysis, both appellant and the government should be better satisfied after a hearing. If he fails, appellant will at least know that the courts have endeavored to give him the maximum protection which the Constitution affords. The government, in turn, should be desirous of knowing that appellant's potential life imprisonment is founded upon a solid basis of fact; if not so based, it should be the first to urge that the conviction be modified accordingly. This result seems more consistent with the recent decision of the Supreme Court in *United States ex rel. Farnsworth v. Murphy*, 79 S. Ct. 76, vacating and remanding, 2 Cir., 254 F. 2d 438."

Identical considerations apply here.

II

The District Court, having ordered a post-conviction hearing, erred in arbitrarily terminating it before the defendants had completed the presentation of their proof of the use of tainted evidence at the trial.

A

By ordering a hearing, the District Court adjudged that there were issues of fact which required the taking of evidence. Having so adjudged, the District Court erred in terminating the hearing before the defendants had completed the presentation of their proof.

The ruling of the District Court on the application for a hearing was expressed in the following statement to the prosecutor (R. 2829):

> "I think, from what I have heard so far and on the basis of the records, the papers offered by both sides, that the matter should be set down for a thorough hearing of the charges and the government's answer thereto. It seems to me, Mr. Mollo, that that is the only way you are going to do complete justice. That is what you are interested in."

When counsel for the defendants called the Court's attention to the holding of this Court, in *Pennsylvania ex rel. Herman v. Claudy*, 350 U. S. 116 (1956), that affidavits submitted by prosecuting officials, denying the allegations of a defendant's petition, did not obviate the necessity for a hearing, the Court responded (R. 2842):

> "I am willing to go along, and even without hearing that quotation from the Supreme Court I think there should be a hearing, the petition justifies it."

The order signed by the District Judge provided (R. 2781) that "defendants' application is granted to the ex-

tent that a hearing is hereby set down for May 6, 1958, at which defendants' first witness shall be Gerome J. Leone."

The effect of this order was to adjudicate that there were issues of fact "justifying the taking of evidence." *Holiday v. Johnston*, 313 U. S. 342, 350 (1941). There, petitioner contended that his rights were violated by the reference, to a commissioner, of a habeas corpus application and by the disposition of the application on the record made before that official. In this Court, the government contended, among other things, that the petition was insufficient. This Court held (p. 350) that a petition for habeas corpus "ought not to be scrutinized with technical nicety" and "moreover, the judge, by calling on the respondent to show cause, adjudged that, in his view, the petition was sufficient and, by referring the cause to a master, evinced a judgment that the petition, the return, and the traverse made issues of fact justifying the taking of evidence." The District Judge here made a similar adjudication.

Leone was sworn and testified (R. 2850-2938). At the conclusion of his direct testimony, the government moved to dismiss the petition (R. 2939). The motion was granted (R. 2960-1) over the objection of the defendants, the Court rejecting their offer of additional proof in support of the application (R. 2955-6, 2959, 2961). The procedure adopted by the District Court finds no support in the statute or in any of the cases adjudicated thereunder. It represents a striking and an unwarranted departure from "the tradition of judicial proceedings," *United States v. Hayman*, 342 U. S. 205 (1952). It is in direct conflict with the holding of this Court in *Holiday v. Johnston, supra*. If countenanced here, it would afford a facile method for evading the plain mandate of the statute that a hearing be held, followed by findings of fact and conclusions of law.

To take a concrete case, suggested by the decision of this Court in *Jordan v. United States*, 352 U. S. 904 (1956), the procedure adopted by the District Court in the instant case would sanction the following: This Court orders a hearing on the defendant's affidavit that the government deliberately elicited an improper response from a witness in order to produce a mistrial. The District Court then requires that the defendant himself be called as the first witness. At the conclusion of the defendant's testimony, after he has repeated the allegations of his affidavit to the effect that the government intentionally produced a mistrial, the Court below dismisses the petition, without permitting the defendant to call any other witnesses or to adduce any additional proof. In this hypothetical sequel to the *Jordan* case, it is obvious at once that defendant has not been afforded the hearing ordered by this Court. It is just as obvious that the petitioners here, in fact, were deprived of the hearing required by §2255.

B

The only opposition to the defendants' application below was provided by the affidavits submitted by the government (G. 1a-124a). This was clearly insufficient. *Pennsylvania ex rel. Herman v. Claudy*, 350 U. S. 116 (1956). The defendants were deprived of their basic rights of confrontation and cross-examination.

The controlling principle was enunciated in *Walker v. Johnston*, 312 U. S. 275, 287 (1941), where this Court held that the question of whether petitioner has sustained his burden of proof must be determined not "by the pleadings and the affidavits, but by the whole of the testimony * * *. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence." See also *United States v. Hayman*, 342 U. S. 205 (1952).

Here, it is not defendants' contentions, but the government's allegations, which are "improbable and unbelievable." We must assume that, for a period of more than eight months after the papers were produced in the summer of 1952, they were freely used by the prosecution, for it maintained consistently that the defendants' rights had not been violated, until Judge Goddard handed down his suppression order on March 27, 1953. *United States v. Lawn*, 115 F. Supp. 674. The government continued to maintain, for a period of more than nine additional months, that the defendants' rights had not been violated, until the government's appeal from Judge Goddard's order was finally dismissed as untimely. *United States v. Roth*, 208 F. 2d 467, re-argument denied December 11, 1953. Since the government affidavits now claim that it did not obtain any leads or clues from the tainted evidence, we are asked to assume that, in the seventeen months intervening between production of the papers and final decision, no use was made of the incriminating evidence in order to ferret out the suppliers of the Tavern inventory, to locate the warehouse in which it was placed, to run down the alleged falsity of the research expenditures, in short, to do everything which an alert and skillful group of Treasury agents would normally do with these documents under the circumstances.

On the contrary, the facts and circumstances indicate convincingly that the production of the Tavern records stirred up, with respect to the research expenses and the closing inventory (the only two Tavern items charged as fraudulent in the bill of particulars), the most feverish activity on the part of the agents. The statute of limitations was about to expire in September of 1953. To argue now, as the government does, that no part of the tainted evidence was used by the agents in connection with this prosecution, is an attempt to deprecate many months of hot pursuit at the most critical phase of the investiga-

tion. Obviously, the issue of what the agents were doing with defendants' papers during that crucial period cannot be disposed of on affidavits.

C

Section 2255 of Title 28, United States Code, provides for a motion to vacate, set aside or correct a sentence, upon the ground that it was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack.

Unless the motion and the files and records of the case "conclusively show" that the petitioner is entitled to no relief, the Court "shall * * * grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." Here, the District Court failed to grant the hearing required by law, made no findings of fact and conclusions of law and made no determination of the issue on the merits.

Ex parte Rosier, 133 F. 2d 316, 325 (D. C. Cir., 1942), clearly defines the scope of the hearing required:

> "The right of hearing under the due process clause includes the right of each party to a cause to introduce evidence in support of his claim or defense, to hear the evidence introduced against him, to test the same by cross-examination, the right that nothing shall be treated as evidence which is not introduced as such, and the right to make argument on questions of both law and fact."

The Court (at p. 325) quoted from *Morgan v. United States*, 298 U. S. 468, 480 (1936), to the effect that:

> "* * * The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by

> the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. * * *"

In *United States v. Paglia*, 190 F. 2d 445, 447 (2d Cir., 1951), the Court pointed out that under §2255 the District Judge is required to examine the "files and records of the case," which must "conclusively show that the prisoner is entitled to no relief," otherwise he is "absolutely" entitled to a hearing. The "files and records" of this case, namely, the trial record and the trial exhibits, do not demonstrate "conclusively," or otherwise, that the defendants are entitled to no relief. The affidavits submitted in opposition to the motion are not part of the "files and records of the case" for purposes of this determination.

With respect to the Tavern research expense, the government's affidavits in opposition (G. 5a-6a), not the "files and records of the case," refer to two interviews with accountants, which took place prior to the defendants' production of their records. The agents were shown a schedule by one accountant indicating that Tavern had taken a deduction of $32,780.93 attributed to "C. Goldenberg, Engineer" (G. 6a), and were told by the other, that 90 to 95 per cent of the checks charged to research expenses were drawn to cash (G. 6a). These revelations may have aroused suspicion but they did not produce evidence. The evidence of fraud came, as Leone testified, from the records obtained from the defendants. In any event, the independent source of the government's trial evidence concerning the Tavern research expense has not been established "conclusively" from the "files and records of the case," it is merely referred to in an untested affidavit submitted in opposition by the government.

With respect to the Tavern closing inventory, the opposing affidavits (G. 51a-52a) attempt to describe an alternative, untainted source of the evidence. Here again, there is no conclusive demonstration from the "files and records" of the case that the suggested alternative was indeed the source of the government's trial evidence. The affidavits merely raise an issue of fact concerning whether the actual source was tainted or untainted. That issue must be determined at a hearing held in the conventional manner.

Furthermore, Tavern's accounts payable ledger (Exhibit 60), to which Present refers as the source of the government's information with respect to the closing inventory (G. 51a), provides information from which it might be inferred, not concluded, that the Tavern inventory was omitted from its tax return. The government made no attempt to refute defendants' assertion in the court below that the inference became an inevitable conclusion only when the defendants were compelled to produce their books and records in violation of their constitutional privilege against self-incrimination. It was only upon the production of the defendants' books and records, including their checks, that the government was in a position to rule out all of the possible alternatives, including the possibility that the purchases, which the government allocated to Tavern's closing inventory, actually were not charged to Tavern, as part of the cost of goods sold shown on the tax return, but were charged to the partners' drawing account and withdrawn by the partners, later to be contributed by the partners to American Brands Corporation, either as capital or as an advance.

D

The Court of Appeals sought to justify the summary disposition below on the ground that Leone was not "the sole source of information as to the government's knowledge," and when he stated that the government, before it obtained the tainted documents, had no knowledge of certain aspects of the case, he could not speak for the agents who had been investigating since 1953. Leone's testimony, which is analyzed in detail elsewhere, see *supra*, pp. 13-17, may not be so narrowly construed.

In short, Leone testified that, after the defendants produced their partnership papers, Present, who was working on the documents, came into his office and said "I think we found the inventory." At the time, he had a slip of paper in his hand which Leone believed was an invoice from the warehouse. After that, Leone attempted to locate the warehouse, finally located it, and the government learned that an inventory had been placed there (R. 2874). Leone assumed "from what was going on and the way the matter was being conducted at the time," that Present got the warehouse slip or invoice from among the papers produced by the defendants under the subpoena *duces tecum* (R. 2884).

With reference to the Gordon research expenses, Leone testified that, before defendants' papers were produced, Twohig had questioned Gordon and had obtained only self-serving declarations (R. 2888). After the defendants' checks were obtained, they were used by Leone in the prosecution of the case (R. 2888). The government had a suspicion about the falsity of the Gordon research expenses, but they wanted evidence (R. 2882). When the defendants produced their checks, they had that evidence (R. 2884).

The only inference which may be drawn from Leone's testimony is that, before obtaining the tainted documents, the agents were suspicious, but were not in possession of evidence, concerning these two important aspects of the prosecution.

Leone's testimony, under oath, was not contradicted. He was not cross-examined by the government. Neither Present nor Twohig, who were in court throughout, took the stand to dispute him. The defendants were denied the right to call the government's agents as part of their affirmative case.

Here, there was no mere "naked assertion" as in *Capsopa*, no claim which was "ancient, indefinite, implausible and patently void of any possible merit" as in *Farnsworth*, no "bare possibility * * * too remote to warrant an evidentiary hearing" as in *Jordan*,* in each of which the defendant nevertheless was found to be entitled to a hearing.

Conclusion

The defendants were entitled to a plenary hearing in the District Court. While the precise issues involved here have never been passed upon by this Court, there is ample authority to indicate that the ruling below represents a substantial departure from standards adopted by it for the administration of justice in federal prosecutions.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD W. WOLFRAM,
Attorney for Petitioners.

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* These cases are discussed *supra* at pp. 28-9.

APPENDIX A

Opinion

UNITED STATES v. GIGLIO

Cite as 263 F. 2d 410

Before SWAN and MOORE, Circuit Judges, and KAUFMAN, District Judge.

MOORE, Circuit Judge.

Defendants Giglio and Livorsi by judgments entered on March 11, 1955 were convicted after a jury trial of income tax fraud. (Internal Revenue Code of 1939), 26 U.S.C.A. §§145(b), 3793(b) and conspiracy. Sentences of fifteen years imprisonment were imposed. The convictions were affirmed by this court (*United States v. Giglio*, 2 Cir., 1956, 232 F. 2d 589) and by the Supreme Court (*sub nom. Lawn v. United States*, 1958, 355 U. S. 339).

These defendants thereafter moved to vacate the judgments upon the grounds that their constitutional rights were denied at the trial in that: (a) evidence was used against them as well as leads and clues obtained therefrom in violation of a court order dated March 27, 1953 suppressing such evidence; and (b) in that the government represented on the trial that such evidence would not be, and was not being, used; or granting defendants a new trial for the same reasons.[1]

The basis for the motion was an affidavit by a former Assistant United States Attorney who had been in charge of the prosecution from approximately February or March 1951 to the summer of 1953 to the effect that the government had no knowledge of various items of proof, important both for indictment and prosecution, until after

[1] In the alternative, defendants moved for a reduction of sentence. This motion was denied.

defendants had produced the books and records suppressed by the order of March 27, 1953. The motion upon affidavits and counter-affidavits came on for hearing on April 16, 1958 and after extensive argument was adjourned to April 17. After further argument the court granted a hearing "on the issues raised" (A 2835, Tr. 4691), i. e., by conflicting affidavits. On May 6, 1958 the hearing commenced at which time the former Assistant United States Attorney, whose affidavit had been submitted in support of the motion, was called as a witness and examined by defendants' counsel at length (85 printed pages A 2852-2937; Tr. 4719-4855). After studying briefs submitted the court said that although he "would have been well within [his] rights if [he] decided the motion on the basis of the papers" (A 2962; Tr. 4893), "on all of the affidavits, testimony at the hearing and on the record as a whole before the Court, I have reached my conclusion, and my decision is that the hearing be terminated forthwith, and that the petition, in so far as it seeks the dismissal of the indictment for the use of so-called 'tainted evidence' should be dismissed because of failure to make any showing that that was the fact" (A 2960, 2961; Tr. 4891).

Although the notices of appeal describe the order appealed from as a denial of a motion for a new trial and appellants' brief refers to defendants' application as "in the nature of a writ of error *coram nobis*" no resort need be had to appellate niceties or technicalities. Clearly, the application contains none of the essential elements for a new trial. There is no showing of any proof discovered since the trial which was not known or which could not have been uncovered on the trial. Turning to *coram nobis* and considering the facts adduced as a collateral attack on the judgments (28 U.S.C.A. §2255) they fail to shake in any way the foundation on which the convictions rest.

In 1945 revenue agents began an investigation of defendants' income tax liabilities. In September 1950 criminal informations were filed against them charging tax violations. In July 1952 they were served with subpoenas *duces tecum* to appear and produce partnership and corporate records. Giglio produced a vast quantity of such records and defendants testified before the grand jury. Shortly thereafter defendants were indicted. Their motion to dismiss the indictments on the ground that evidence had been obtained in violation of their Fifth Amendment rights was granted and the government was directed to return the partnership and personal records subpoenaed (*United States v. Lawn*, D.C.S.D.N.Y. 1953, 115 F. Supp. 674). In July 1953 the grand jury returned another indictment also charging tax violations. The defendants moved to dismiss this indictment; to have a hearing to determine whether any of the suppressed evidence had been used to obtain it; to inspect grand jury minutes; and to suppress the use upon the trial of evidence illegally obtained. The court denied the motion, holding that there was no room for any inference that the government had used such evidence but that if during the trial defendants had reason to believe that it was being so used they were free to object at that time (*United States v. Giglio*, D.C.S.D.N.Y. 1954, 16 F.R.D. 268).

Upon the trial defendants were thus aware that there was evidence which was subject to attack and that they were at liberty to attack it. This privilege they exercised even to examining the Assistant United States Attorney, whose testimony as to when and how the government first learned of the facts essential to its case defendants now claim was vital. On appeal from the conviction this court sustained the trial court's finding that there was "nothing in the record of trial suggesting any use of illegal clues" and held as to the "so-called 'tainted' evidence" that "appellants had a right of full cross examination during the trial as to the sources of government

exhibits and that they exercised this right on a number of occasions" (232 F. 2d 589, 595).

The Supreme Court granted certiorari (352 U. S. 865) and devoted a substantial portion of its opinion (355 U. S. 339) to the contention that appellants were deprived of an opportunity to examine witnesses "to determine whether evidence derived from leads and clues furnished by testimony and documents obtained from petitioners in a prior grand jury investigation was used by the prosecution at the trial * * *" (355 U. S. at page 344). The court reviewed all the prior proceedings directed towards the tainted evidence and held that appellants were not entitled to a full-dress preliminary hearing to ascertain whether the suppressed material had been used by the grand jury which returned the 1953 indictment.

More specifically and dealing with the examination of the former Assistant United States Attorney whose testimony is made the basis for the present proceeding, the court said that there was no basis for the contention that appellants "were denied an opportunity to show derivative use of tainted evidence by the Government at the trial" (355 U. S. at pages 357-358).

As a practical matter a needless burden would be placed upon the courts by the procedure suggested by appellants. They would force the government in advance to specify the testimony and each and every document it intended to use upon the trial and would have a hearing to determine the source of this potential evidence.[2] Such a hearing would be tantamount to a full-scale trial.

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[2] In *United States v. Klapholz*, 2 Cir., 1956, 230 F. 2d 494, 497, certiorari denied 1956, 351 U. S. 924, this court indicated that it might be better policy to decline jurisdiction over pre-trial motions to suppress "leaving the defendants free to move for suppression in the trial court." Referring to the case then before it on appeal this court said that "Such a course would have avoided invasion of the trial court's normal province to pass on the admissibility of evidence in the trial without jeopardy to the right of the defendants to the exclusion of evidence under the *McNabb* rule" (230 F. 2d at pages 497-498, footnote omitted).

Upon the trial itself if evidence derived from tainted sources had been offered, counsel by *voir dire* examination could have learned from the witness, revenue agent or otherwise, from what source he had become aware of the facts about which he proposed to testify. The witness and he alone would be the person qualified to supply such information.

In view of the history of this case the statement of the same former Assistant United States Attorney falls neither into the category of newly discovered evidence (new trial) nor collateral impeachment (*coram nobis*). Nor can a single Assistant United States Attorney assigned to prepare a case for trial be the sole source of information as to the government's knowledge. When he makes an affidavit that to the best of his recollection the government had no knowledge he, of necessity, is limited to his own knowledge. When a case is tendered to a United States Attorney's Office for trial it has usually been under investigation by some one or more agencies of the government for months or years. In this very case revenue agents had been working on it for eight years before the 1953 indictment was found. Of the books and records subpoenaed only the partnership and personal records were suppressed; not the corporate.

Awareness of the significance of an item of proof is not synonymous with knowledge. Practical experience teaches that concentrated study and appraisal of available proof accumulated through the years invariably results in a reappraisal of the value of many evidentiary items on the eve of trial. Some items previously regarded as important may be discarded; others, possibly because trial counsel either have originally failed to grasp their significance or choose to change their trial strategy, acquire importance. Prosecution and defense alike share this experience. Only upon the trial itself can the source of any witness' knowledge with respect to proof then being of-

fered be ascertained. If a revenue agent testifies that the subject matter of his testimony came only from a record obtained in violation of a defendant's constitutional rights it can be suppressed or stricken by the trial judge. If on the other hand he testifies that the facts were developed from records lawfully obtained a jury question may result if there be conflicting testimony. And if the records lawfully obtained contained the information or leads from which the information was subsequently obtained there would be no basis for suppression merely because the same information might also have been found in suppressed records.

The defendants here have been afforded every opportunity at the appropriate time, namely, upon the trial to inquire as to the source of every witness' knowledge. The district court terminated the hearing only after being satisfied that the proof relied upon by defendants was wholly insufficient. This court, the Supreme Court and the district court now on this motion have carefully reviewed this phase of the case. Defendants have had a fair trial, two appeals and a reconsideration focused upon the source of the government's knowledge. Their guilt and the fairness of the procedures which proved it have been well established.

The orders appealed from are affirmed.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of February one thousand nine hundred and fifty-nine.

Present:

HON. THOMAS W. SWAN,
HON. LEONARD P. MOORE,
Circuit Judges
HON. IRVING R. KAUFMAN,
District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM GIGLIO and FRANK LIVORSI,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.